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CASE NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

FLORIDA STATE UNIVERSITY, et al.

Petitioners,

v.

DR. ANJALI A. JOSHI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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The Petitioners respectfully request that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered on June 21, 1985.

QUESTIONS PRESENTED

1. Is an Employer required to prove by a preponderance of the evidence, after Plaintiff establishes a prima facie case:

A. that all those ultimately chosen as well as those to whom the position was offered, were better qualified than Plaintiff?

B. that the Plaintiff would not have been hired even in absence of

discrimination where there is no direct evidence of discrimination?

2. Did the Court err by requiring that in order to rebut a prima facie case of sex discrimination, an employer must prove by a preponderance of the evidence that it did not discriminate where:

a. those chosen were better qualified than the Plaintiff,

b. there is no finding of pretext and,

c. there is no direct evidence of discrimination.

3. Does Fed.R.Civ.P. 52(a) permit a Court of Appeals to reject a finding of no discrimination by two district judges in the same case where the employer has offered a plausible

legitimate business reason for its hiring decision and where the person hired is better qualified than the Plaintiff.

PARTIES

Petitioners (Defendants): FLORIDA STATE UNIVERSITY (FSU); BERNARD F. SLIGER, in his capacity as President of FSU; DR. HOMER OOTEN, in his capacity as Director of Business Affairs; DR. ROBERT HUNTER, in his capacity as former Director of FSU Health Center; DR. PHILIP ROND, as Director of the FSU Health Center.

Respondent (Plaintiff)

DR. ANJALI A. JOSHI

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OFFICIAL REPORTS OF CASE

The decision of the Court of Appeals is reported at 763 F.2d 1227 (11th Cir. 1985) and appears in the Appendix hereto. A written judgment was rendered by the District Court for the Northern District of Florida based on the Court's ruling from the bench which appears in the Appendix hereto.

GROUNDS FOR INVOKING JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on June 21, 1985. Petitions for rehearing by the panel and rehearing *en banc* were denied by order entered August 7, 1985. The order staying issuance of the mandate pending

petition for writ of certiorari to and including September 16, 1985, was entered and filed on August 23, 1985. Jurisdiction is conferred by 28 U.S.C. Sections 1254(1) and 2101(c).

The appeals court rendered a decision in conflict with the decisions of another court of appeals on the same matter; has decided an important question of federal law which has not been, but should be, settled by this Court; and has decided a federal question in a way in conflict with applicable decisions of this Court. There is a conflict among decisions, and the Court should exercise its powers of supervision.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964:

1. 42 U.S.C. Section 2000e-2(a)(1), (2)

"(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Pub.L. 88-352, Title VII, Section 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, Section 8(a), (b), Mar. 24, 1972, 86 Stat. 109.

2. 42 U.S.C. Section 2000e-5(g)

"Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such lawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for

any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title."

Pub.L. 88-352, Title VII, Section 706, July 2, 1964, 78 Stat. 259; Pub.L. 92-261, Section 4, Mar. 24, 1972, 86 Stat. 104.

Fed. Rule of Civil Procedure 52. Findings by the Court

> (a) Effect. "... Findings of fact, whether based on oral or documenary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses".

STATEMENT OF THE CASE

Petitioners are a state universit certain staff members of the universit and the president of the university. They were defendants in the trial cour

The Plaintiff is the Respondent. In this petition, the Respondent will identified as Plaintiff, and the Petitioners will be identified as Employer.

Plaintiff, a female physician, unsuccessfully applied for a job at th Florida State University Health Center. Originally claiming that she was not hired because of her sex, religion and national origin, Plaintif brought suit against the Defendant und Title VII of the Civil Rights Act of 1964, Sec. 701, 42 U.S.C.A., Sec. 2000

et seq. The alleged basis for jurisdiction was 28 U.S.C., Sections 1343(4), 2201 and 2202 and 42 U.S.C. Sec. 2000e-f.

The gist of the Plaintiff's complaint was that she filed her application for employment at Florida State University for the position of staff physician at the university health center in 1974. Plaintiff alleges she was interviewed for the job, was not hired, but the position remained open and the Employer continued to seek applicants from persons of the Plaintiff's qualifications. Plaintiff contends that despite her qualifications, she was rejected because she is a female, Indian and Hindu.

After the first trial in 1980, the

district court held that although the Plaintiff had made out at least the general requirements of the prima fac case, some question existed as to the sufficiency of her qualifications for the position.

The district court further found the decision not to hire the Plaintif was based on legitimate nondiscriminatory reasons that had nothing to do with her religion, her national origin or sex. The Court further found that Plaintiff was no longer an applicant in that after she was rejected in favor of another, mor qualified physician, she did not re-apply and, instead, advertised in the local newspaper that she was associat with another doctor in the practice o

medicine. Thus, she was no longer in the running when a final hiring took place. The Court dismissed the complaint because Plaintiff failed to prove discrimination by a preponderance of the evidence. 486 F.Supp. 86 (N. Dist. Fla. 1980)

The Plaintiff appealed to the United States Court of Appeals for the Fifth Circuit. The appeals court affirmed except for the last time frame (April - September, 1976). It reversed and remanded the case, Joshi v. Florida State University Health Center, 646 F.2d 981 (5th Cir. Unit B, 1981), cert. denied, 456 U.S. 972, 72 L.Ed.2d 845, 102 S.Ct. 2233 (1982) ("Joshi I").

Regarding this last time frame the appeals court directed the trial court

as follows:

> ". . . On remand the district court must determine whether the defendants produced or are now able to offer evidence of a legitimate, nondiscriminatory reason explaining their failure to hire Dr. Joshi and produced (sic) evidence that those ultimately chosen had qualifications equal to those of the plaintiff. . ." 646 F.2d at 990

In 1984 after a second trial before a different District Judge, the trial court found the employer offered legitimate business reasons for not hiring the Plaintiff, including it did not believe she was an active applican and the two doctors ultimately chosen had qualifications superior to those o the Plaintiff. The trial court found discrimination and entered judgment fo the employer. (See Appendix A-47) Plaintiff appealed again.

The Eleventh Circuit reversed. It said, inter alia, the trial judge was clearly erroneous in finding the employer did not believe the Plaintiff was an applicant. The appellate court further found the employer must prove "by a preponderance of the evidence that all those to whom the position was offered, not merely those ultimately employed, were better qualified than Joshi." Joshi v. Florida State University Health Center, 763 F.2d 1227, 1236 (11th Cir. 1985)("Joshi II")

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT, OTHER CIRCUIT COURTS OF APPEAL AND IT'S OWN.

The burden of proof standard for a Title VII case is that of McDonnell Douglas Corp. v. Green, (1973) 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668. It was further clarified by Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

The Appellate Court, however, by this Joshi II decision, has reverted back to the pre-Burdine, erroneous

standard in at least three substantial ways. First, Joshi II requires the employer to prove non-discrimination. Second, it requires the employer to prove it by a preponderance of the evidence.

Burdine	Joshi II
"The Court of Appeals would require the Defendant to introduce evidence which, in the absence of any evidence of any pretext, would 'persuade' the trier of fact that the employment action was lawful. This exceeds what properly can be demanded to satisfy a burden of production." (at 257)	In order to prove that Joshi would not have been hired even in the absence of discrimination, defendants are required to show by a preponderance of the evidence (cite omitted) that all those to whom the position was offered, not merely those ultimately employed, were better qualified than Joshi. (at 1236)

Third, it requires the employer to prove that those ultimately employed and all those to whom the position was offered were better qualified than Joshi.

> "But Title VII does not obligate an employer to accord this preference. Rather, the employer has discretion to choose among equally qualified candidates..." Burdine (at 250)

The error is particularly egregious in that the Appellate Court had specifically instructed a different standard when it remanded this case the first time, shortly after Burdine was decided.

> "On remand, the district court must determine whether the Defendants produced or are now able to offer evidence of a legitimate, non-discriminatory reason explaining their failure to hire Dr. Joshi and produced

evidence that those ultimately chosen had qualifications equal to those of the Plaintiff. (cite omitted) Joshi I at 990.

On retrial, the District Judge followed those instructions and specifically found:

> ... The people at the University in charge of the hiring process did not in fact believe she was an applicant. There is no evidence before this court and this court finds that her gender was not a factor in her failure to be considered or to have her application considered.
> ...the persons ultimately chosen, that's Doctors Heller and Latey, had qualifications at least equal to those of the Plaintiff.
> ...the Plaintiff has not demonstrated whatsoever that the proffered reasons for hiring Doctors Heller and Latey, that is that they were better qualified is not a fact, in fact, its the true reason for the employment decision. (Transcript of Proceedings, pp. 219, 220.)

Yet, the Appellate Court in Joshi II, now imposes this new, erroneous standard, refuses to consider employer articulated, non-discriminatory reason and then enters judgment for the Plaintiff.

The Appellate Court decision in Joshi II ultimately turns on this new standard by requiring that the employe prove that one applicant's (Dr. Burk) qualifications were better than Dr. Joshi's. Instead, the Appellate Court should have required the Plaintiff

> "... to demonstrate that similarly situated employees were not treated equally." Burdine at 1097.[1]

Furthermore, Joshi II requires employers to refrain from offering positions of employment to non-minority persons and from "encouraging them to accept offers of employment" (advertising?) except and only if the offerees and those encouraged are better qualified than any minority applicant. This is directly contrary to Burdine.

1 The Joshi II decision imposes this new requirement regarding Dr. Burk based on a Footnote in Joshi I at page 985.

Joshi II is, likewise, the result of the Eleventh Circuit's expansion of the employer's evidentiary burden by engrafting Mount Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) on Title VII cases. See, for example, Perryman v. Johnson, 698 F.2d 1138 (11th Cir. 1983); Bell v. Birmingham, 715 F.2d 1552 (11th Cir. 1983); and Lewis v. Smith, 731 F.2d 1535 (11th Cir. 1984), the case which Joshi II cites as its authority for its new burden of proof. At least one other circuit has specifically rejected use of Mt. Healthy to analyze Title VII issues and, instead, has relied on the Burdine standard. Bibb v. Black, 749 F.2d 508 (8th Cir. 1984).

Mount Heathy was a First Amendment case which required an employer to prove by a preponderance of the evidence that, absent the protected activity by the employee, the decision to terminate would have been the same. But this burden of persuasion arose only after the employee showed that there was protected activity and that it was a "substantial or motivating factor" in the employer's actions.

The Mount Healthy standard of proof should not be extended to Title VII cases as is clearly shown by Burdine.

Until Joshi II, the Eleventh Circuit Court of Appeal reserved applicability to cases where direct evidence of discrimination was shown by the plaintiff at the prima facie

stage. (Lewis case, supra). In the Joshi case (both I and II) there is no direct evidence of discrimination. Bo District Judges found to the contrary. Thus, the Appellate Court has now applied the Mount Healthy standard not only to a Title VII case, but to one i which the Plaintiff produced no direct (or even circumstantial) evidence of discrimination. Instead, the Appellat Court produced its own view of some of the facts to preclude Employer's evidence and as a substitute for direc evidence.

Joshi II, likewise, erroneously holds that "there must be showing of some factual basis to support the

'conclusions of the Defendants'". But Burdine holds the Defendant has no such burden.

> "... We are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext." at p. 258.

Ironically, the employer did show a factual basis for believing that Joshi was not an active applicant.[2] The Appellate Court refuses to accept it.

2 The unrefuted testimony at the second trial was that after her application was rejected, she never re-applied, even though she knew she should; even she did not know she was an applicant; the administrators of the University at that time did not consider her an active applicant (Ooten, Rond, Groomes, Butler, Robinson).

In effect, the Appellate Court us
it's prior impression of ambiguous,
undeveloped issues and facts to preclu
the employer's explanation of why the
Plaintiff was not hired. Given its ne
erroneous intrepretation of Joshi I,
Joshi II eliminates any need for the r
trial it ordered in Joshi I. Joshi II
is contrary to decisions of the Suprem
Court, other Circuit Courts and its ow

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AS TO THE PROPER APPLICATIONS OF FED.R.CIV.P. 52(a)

The Eleventh Circuit has rejected the findings of fact of the District Court that the employer did not discriminate against the Plaintiff. In doing so, the Appellate Court has substituted its judgment for that of the trier of fact. The Eleventh Circuit's failure to follow (once again) the plain meaning of Rule 52(a) flies in the very face of Anderson v. City of Bessermer City, North Carolina 470 U.S. ____, 84 L.Ed.2d 518, 106 S.Ct. ____ (1985) This Court in Pullman-Standard v. Swint, 456 U.S. 273, 72 L.Ed.2d 66, 102 S.Ct.

1781 (1982), and now again in Anderson has emphasized Rule 52(a) demands even greater deference to the Trial Court's finding of fact particularly when the finding is based on determination regarding the credibility of witnesses. Anderson, 84 L.Ed.2d at 529. Conspicuously, Joshi II does not mention Rule 52(a).

Twice the Defendants have prevail in the Trial Court. Two different District Court judges have found no discrimination. Twice the Appellate Court has erroneously rejected the findings of no discrimination of the Trial Judge.

The issue before the Court was th motivation of the employer in failing hire the Plaintiff. The judge had to

determine if the requisite discriminatory animus was present. This is simply a fact determination based on the credibility of witnesses.

The Trial Court concluded after the trial on remand, the "defendants did not in fact believe that she was an applicant". The facts to support this were furnished by the testimony of Dr. Rond, the Director of the health center, who was charged with the hiring of physicians. In addition, Dr. Groomes, the affirmative action officer at the University, R. Robinson, the University Personnel Director, and B. Butler, the health center personnel director, all testified they did not think the Plaintiff was an active applicant. Their testimony is plausible and

credible and the trial court so found This allowed "the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus". Burdine 101 S.Ct. at 1096.

The decision of the Eleventh Circuit in attributing error to the trial court's finding is in direct conflict with Anderson and Pullman-Standard. Anderson holds:

> "But when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error. (cases cited)"
> 84 L.Ed.2d at 529-530.

The Appellate Court failed to abide by this application of Rule 52(a).

The Eleventh Circuit continues to insist on following the erroneous standard of review promulgated under the Fifth Circuit cases free from the strictures of Rule 52(a). (See Pullman-Standard, 102 S.Ct. at 1788, n. 15 and 1792).

The Appellate Court has made an independent examination of the record, applied its own interpretation to the facts, picked bits and pieces of evidence from Joshi I and arrived at its own conclusion. This de novo review directly conflicts with Anderson and Pullman-Standard. It then compounds its own error by failing to remand the case to the District Court.

The Eleventh Circuit has further rejected the findings and competent evidence of no discrimination produced in accordance with its own instructions. Instead, without reference to Rule 52(a), without logic and without citing a single case to support this rejection, the Appellate Court has branded the employer as an invidious discriminator. (See Joshi II, pp. 1233-1235).

The decision by the Appellate Court is totally contrary to Rule 52(a) and violates every principle laid down in Anderson and Pullman-Standard. If there was ever a case in which the purpose of Rule 52(a) was illustrated, this is it. Two different trial judges found no

discrimination and entered judgment for the employer. Each time the Appellate Court has reversed, now even finding for the Plaintiff without remand. The Trial Court's decision and finding were, in effect, meaningless. They were merely a "tryout on the road". Anderson, 84 L.Ed.2d at 529.

CONCLUSION

We request that this writ be granted.

Respectfully submitted,

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APPENDIX

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Judgment of the United States District Court, Northern District of Florida	A-47

Dr. Anjali A. Joshi,
Plaintiff-Appellant.

v.

FLORIDA STATE UNIVERSITY HEALTH CENTER, Bernard Sliger, in his capacity as President of Florida State University, Dr. Homer Ooten, in his capacity as Director of Business Affairs, Dr. Robert Hunter, in his capacity as Former Director of Florida State University Health Center, Dr. Phillip C. Rond, as Director of Florida State Health Center, Defendants-Appellees.

No. 84-3387.

United States Court of Appeals
Eleventh Circuit.

June 21, 1985.

Dr. Anjali Joshi appeals from a decision of the district court, 486 F.Supp. 86 (N.D. Fla. 1980), holding that Florida State University ("FSU") did not discriminate against her in its failure to hire her for a position at the FSU Health Center between April and

September 1976. We reverse.

A prior appeal in this case was decided by the Fifth Circit in 1981. Joshi v. Florida State University, 646 F.2d 981 (5th Cir., Unit B, 1981), cert. denied, 456 U.S. 972, 102 S.Ct. 2233, 72 L.Ed.2d 845 (1982). The Court in this prior appeal ("Joshi I") affirmed the district court's finding of no discrimination in three of the instances alleged by Joshi; however, the Court reversed the district court's ruling as to the fourth instance of discrimination holding that the district court had erroneously found that Joshi was no longer in the running for employment during the period from April to September 1976. The Court in Joshi I found that Joshi "was actively in the

running for a position as staff physician" during this time period and directed that the district court determine on remand "whether the defendants produced or are now able to offer evidence of a legitimate, nondiscriminatory reason explaining their failure to hire Dr. Joshi." Id. at 990.

On remand, the district court applied the law of the case to the issue of whether Joshi was an applicant, indicating that the Court "was not free to re-examine the issue of whether or note this plaintiff was an applicant or an active applicant for the positions between the period of April '76 and September of '76. That issue was foreclosed by the opinion of the 5th

Circuit Court of Appeals and the opinion of this Court."

The court found, however, that while plaintiff was an active applicant for the position, she was not actively considered because the people at FSU in charge of the hiring process did not in fact believe that she was an applicant. The court further found that "the persons ultimately chosen, that's Doctor Heller and Latti Latey , had qualifications at least equal to those of the plaintiff and that the fact that these doctors were better or equally qualified is the true reason for the employment decision.

Although the only issue on this appeal relates to the fourth alleged instance of discrimination, that

relating to the hiring of two male physicians in September 1976, reference to the entire series of contacts between Joshi and the FSU Health Center is essential to an understanding of the factual context in which the instant allegation of discrimination arose. That factual context, largely as stated in Joshi I, is as follows: Joshi initially made a formal application for a position as staff physician in August 1975. During the middle of that month, she was interviewed by Dr. Robert Hunter, then director of the Health Center. According to his usual procedure, he conducted her through the medical center and introduced her to several physicians with whom she had brief interviews. Following the tour,

Hunter polled the physicians who had met Joshi. None had any objections to her personality or attitude. Hunter found Joshi to be fully qualified for employment as a staff physician, but he needed written authorization from Dr. Homer Ooten, the University administrator with primary fiscal responsibility for the Health Center, before he could fill any position at the Center.

On August 18, 1975, Hunter submitted Joshi's name, along with the names of five other applicants he had found to be qualified, in a memorandum to Ooten requesting authorization to hire the six doctors. Hunter recommended the doctors in the order in which each had made a firm commitment to accept the

appointment. Ooten approved the hiring of the first four on the list. As Joshi's name was fifth on the list, she was not hired.

On August 21, 1975, Hunter wrote Joshi to inform her that he had not received approval to hire her. He stated that she was "next on the list and (would) have the first opportunity for the next position that opens." On January 8, 1976, Hunter sent a memorandum to Ooten in which he requested authorization to hire Joshi "at the earliest possible date" since the Medical Center was understaffed and Joshi was next in line for employment in terms of qualifications and priority.

Ooten replied by memorandum dated January 19, 1976. He stated that he was

concerned about the small number of physicians on the staff but that he felt that the fact that Joshi was next in line in terms of the date on which she had made a firm commitment to accept employment was insufficient justification for hiring her. He stated that he did not feel that a commitment had been made to Joshi despite the implications of Hunter's letter to her on August 21, 1975. He requested Hunter to arrange for a select group of staff physicians to interview Joshi and forward their comments regarding her to him by way of written recommendation.

On January 22, 1976, Dr. Joshi met with this committee. The next day, Dr. McHugh, who had chaired the committee, submitted a written report of the

interview to Ooten. He stated therein that the committee had questioned Joshi about her past medical experience and reached the conclusion that she appeared well qualified for the position. However, he concluded with the statement that he felt the vacancy should be advertised to determine the availability of physicians prior to hiring any staff physicians. Ooten testified that he called a meeting of the committee members on February 20, 1976, in order to clarify the meaning of this report since it contained no clear recommendation either to hire or not to hire Joshi. He testified that he learned that some of the physicians had reservations about Joshi's qualifications.

Hunter stepped down from the position as director of the Health Center effective January 31, 1976. Dr. Philip Rond became acting director on or about February 1, 1976. Hunter testified that he assumed the position of staff physician, apparently the position to which Joshi aspired, on January 31, 1976.

In early February 1976, Joshi telephoned Hunter to find out what had been the result of her interview. Hunter told her that he was no longer the director and that she should contact Ooten. Ooten told her that there was no vacancy.

On February 26, 1976, a staff physician at the Health Center resigned, creating a vacancy. On February 27,

Ooten phoned Joshi and told her there was a vacancy for which they were going to advertise in the professional journals. That same day, Ooten wrote Joshi a letter to inform her that she was being considered for the position of staff physician. From March 11, 1976, through March 20, 1976, a staff physician position was posted as vacant in accordance with state personnel rules.

On March 17, 1976, a Physician's Selection Committee established by Rond made three recommendations: First, they recommended that Hunter be placed in the category of staff physician. Second, they recommended that Joshi's application be "tabled until the results of an advertisement have produced, or

failed to produce, further applications." Finally, the committee recommended that the Health Center make an effort to employ at least two full-time physicians.

On March 19, 1976, Ooten wrote Joshi to inform her that the position for which she was being considered was to be filled by Hunter. He states that her qualifications were impressive but that the committee had "recommended the qualification of the person selected over those of yourself." On April 2, 1976, Joshi filed charges of discrimination with the Equal Employment Opportunity Commission.

On April 23, 1976, another staff physician resigned, creating another vacancy at the Health Center. During

the spring and summer of 1976, Rond sought applications for physicians at the Health Center. Although he advertised and actively recruited certain physicians, he made no effort to contact Joshi to notify her of the need for additional physicians at the Center.

On June 11, 1976, the Physician's Screening Committee met to review the curriculum vitae of doctors who had written about employment in order to choose one for employment in the immediate future. The committee recommended that a position be offered to Dr. Charles Freeble, III, and that interviews be set up with three additional applicants. Joshi's name was not mentioned. Freeble turned down the offer on July 19, 1976.

On July 25, 1976, an advertisement announcing the association of Joshi with another doctor in the practice of family medicine appeared in the Tallahassee Democrat. Joshi, however, testified that she never withdrew her application from the University despite this association.

In September 1976, Rond hired two male physicians for the Health Center, Dr. Latey and Dr. Heller. On June 14, 1978, Joshi filed suit in federal district court seeking damages and injunctive relief for the defendant's alleged violation of Title VII.

I. ISSUES

The issues for decision by this Court are as follows:

1. Did the district court err in its

application of law of the case?

2. Is the district court's finding that defendants rebutted plaintiff's prima facie case error as a matter of law?

3. If plaintiff proved discrimination, did defendant meet its burden of proof that plaintiff would not have been hired even in the absence of discrimination?

II. DISCUSSION

A. Law of the Case

The district court applied the law of the case doctrine to refuse to re-examine the issue of whether Joshi was an active applicant. The court found, however, that Joshi was not actively considered for hiring because the

defendants did not in fact believe that she was an applicant.

Under the law of the case doctrine, both the district court and the court of appeals generally are bound by findings of fact and conclusions of law made by the court of appeals in a prior appeal of the same case. However, the law of the case doctrine does not apply to bar reconsideration of an issue when (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to that issue, or (3) the prior decision was clearly erroneous and would work manifest injustice. Further, while the doctrine encompasses only those issues previously determined, the law is clear

that it "comprehends things decided by necessary implication as well as those decided explicitly."
Wheeler v. City of Pleasant Grove, 746 F.2d 1437, 1440 (11th Cir. 1984) (citations omitted) (emphasis in original).

(1) Joshi contends that the district court correctly applied law of the case to the finding that she was an active applicant and that none of the three exceptions applies. She further contends that law of the case applies to the statements in Joshi I that "offers" were made to particular male applicants. See Joshi I, 646 F.2d at 985, 985 n. 18, 990.

FSU argues first that law of the case applies only to the specific findings in

Joshi I and not to "observations, commentary, or mere dicta touching upon issues not formally before the Court." Gertz v. Robert Welch, Inc., 680 F.2d 527, 533 (7th Cir. 1982), cert. denied, 459 U.S. 1226, 103 S.Ct. 1233, 75 L.Ed.2d 467 (1983). Thus, it contends that the references in Joshi I to "offers" were dicta because the only issue was whether plaintiff had made a prima facie case, which includes a showing that defendants continued to seek applicants, not that they made offers. We disagree. The finding that offers were made to four male physicians was an essential component of the Joshi I court's holding that Joshi had made out a prima facie case. In Joshi I, the Court stated:

(W)e conclude that Dr. Joshi made out a prima facie case of employment discrimination in this final instance under the McDonnell Douglas standards and that the defendants have as yet failed to show a legitimate reason for their failure to hire her. She is a woman and thus a member of a class protected by Title VII. She had applied, and was qualified for a position for which the Health Center was actively recruiting applicants. The defendants made offers of employment to at least four male physicians during the period in question and ultimately hired two men to fill positions for which Dr. Joshi was qualified.

Joshi I, 646 F.2d at 990. As shown by this excerpt from Joshi I, the finding that offers were made to four male physicians was used to satisfy the requirement of the McDonnell Douglas test that plaintiff prove that the position remained open. Hence it was essential to the court's holding and is binding as law of the case. In addition, the Joshi I court found that "Dr. Rond also wrote to Dr. Charles Freeble, III, and Dr. William Burk encouraging them to accept offers of employment at the Health Center." Id. at 985 n. 18. This finding is an essential subsidiary finding supporting the finding that offers were made to four male physicians. The four males identified in Joshi I as receiving

offers are Freeble, Burk, Heller, and Latey. Because this is an essential subsidiary finding supporting the court's holding that Joshi had made out a prima facie case, this Court is bound by law of the case to find that offers were made to Drs. Freeble, Burk, Heller, and Latey.

(2) FSU further argues that the only relevant finding in Joshi I was that plaintiff had made out a prima facie case by showing that she "was actively in the running for a position." Joshi I, 646 F.2d at 990. FSU contends the Court in Joshi I specifically expected defendant to be allowed to produce evidence to rebut plaintiff's prima facie case, including her status as an applicant. Thus, defendant contends

that law of the case is inapplicable. This argument is without merit. The Court in Joshi I specifically held that Dr. Joshi "was actively in the running for a position as staff position during this period." The district court correctly found that this holding was binding as law of the case and refused to reconsider the question of whether Joshi was an applicant.

(3) FSU next argues that even if law of the case might otherwise apply, two of the exceptions to the doctrine bar its use. First, FSU contends that the second trial produced substantially different evidence. We have reviewed this evidence and find that it is not substantially different evidence but rather evidence previously considered,

information obtained by defendants after they decided not to consider plaintiff, or information not in evidence but presented on proffer only.

(4) FSU also contends that a second exception to the law of the case doctrine applies: controlling authority has since made a contrary decision of law applicable to the issue. It points to Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), decided between oral argument and the opinion in Joshi I, and to Pullman-Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982), decided subsequent to Joshi I. This argument is without merit. The Court in Joshi I considered and applied the Supreme Court's holding

in Burdine. Although Pullman-Standard was decided subsequent to Joshi I, FSU has pointed to no disparity between the legal standards discussed in Pullman-Standard and those applied in Joshi I.

B. Defendant's Burden of Rebuttal

The well-known requirement of a defendant-employer once a prima facie case of discrimination has been established is stated by the Supreme Court in Burdine, supra. There, the Court said:

> The burden that shifts to the defendant therefore is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason. The

defendant need not persuade the Court that it was actually motivated by the proffered reasons. See (Board of Trustees of Keene State College v.), Sweeney, supra (439 U.S. 24), at 25 (99 S.Ct. 295, 296, 58 L.Ed.2d 216). It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant.

450 U.S. at 254, 101 S.Ct. at 1094

(footnotes omitted).

(5) Here, the trial court found, without mentioning the term "rebuttal," that "the plaintiff was not actively considered for hiring between the period of April '76 and September '76 because the people at the University in charge of the hiring process did not in fact believe that she was an applicant."

This finding of fact is clearly erroneous for two reasons: (1) Drs. Hunter, Ooten and Rond, as well as the University's Equal Employment Opportunity officer, were intimately engaged in the hiring process so far as it related to Dr. Joshi. Not a single one of these persons other than Dr. Rond testified that he did not consider Dr. Joshi an applicant after April 1. Even

Dr. Rond's testimony is far from explicit. His testimony with respect to this matter was as follows:

Q: Dr. Rond, during this period, that is between April and September of 1976, do you know if Dr. Joshi was considered for a position at the Health Center?

A: I would say that she was certainly in the mind of the people in the Health Center. Yes.

Q: Had she been interviewed by the committee?

A: She had been interviewed prior to March of 1976.

Q: Did you in any manner intend to exclude her from any consideration?

A: I didn't intend to exclude her.

Q: Did you think she was an applicant?

A: I didn't think she was an active applicant. No, I had

no evidence that she was an active applicant.

Q: Why not?

A: I never had any contact from her of any sort.

Neither Dr. Hunter, who had originally told Dr. Joshi that she was "next on the list and (would) have the first opportunity for the next position that opens,"[1] nor Dr. Ooten who had written Joshi on February 27 to inform her that there was a vacancy for a staff physician for which she was being considered (without her having made a new application), nor the University

1 Dr. Hunter did not advise her that it would be necessary for her to file an additional application.

Equal Employment Opportunity official testified that he or she did not believe Joshi was an applicant. Thus, even though the court's finding as to the conclusion reached by the defendants might have been sufficient so far as concerns Dr. Rond, there was clearly no evidence from which the trial court could make the finding of fact that "the plaintiff was not actively considered for hiring between the period of April '76 and September '76, because the people at the University in charge of the hiring process did not in fact believe that she was an applicant." (Emphasis added.)

(2) There is another purely objective reason for our holding that, even with respect to Dr. Rond, the

evidence was simply overwhelming that all of the named defendants who actively participated in the series of events from the first consideration of Dr. Joshi's application actually knew that she was an applicant at the time of the vacancies.

Whether defendants' erroneous conclusion that Joshi was not an applicant is a legitimate non-discriminatory reason for not considering her depends upon the facts. That is to say, there must be a showing of some factual basis to support the "conclusion of the defendants." The critical facts bearing on this issue as developed at the second trial are as follows:

A. The very persons who the court

found "did not in fact believe that she was an applicant," were precisely the same persons whose conduct caused us to conclude in Joshi I that Dr. Joshi was a current applicant.

B. Dr. Hunter told Joshi on August 21, 1975, that she was "next on the list and (would) have the first opportunity for the next position that opens" (without telling her she need file a new application).

C. Five months later, on January 8, 1976, Hunter sent a letter to Ooten requesting authorization to hire Joshi "at the earliest possible date" (without her having made a new application).

D. On February 27, 1976, Dr. Ooten telephoned Joshi and wrote her a letter to inform her that there was a vacancy

for a staff physician for which was being considered (without her having made a new application).

E. On March 19, she was notified by Ooten that Dr. Hunter, the Director of the Health Center for five years, had been placed in the position she had sought, although her qualifications were "impressive." He ended his letter: "Thank you for your interest in employment at Florida State University."

F. At the March 19th meeting, the Physician's Selection Committee considered the pending applications and at that meeting the Committee voted that Dr. Joshi's application be "tabled until the results of an advertisement have produced or failed to produce further applications." (Emphasis added.)

G. In an affidavit of June 3, 1976, by Dr. Groomes, the University Equal Employment Opportunity official she stated: "I have discussed (Dr. Joshi's) interest in employment with appropriate University officials and have reaffirmed with them that her application be considered fairly and that she continue to be advised regarding her status as a candidate for any vacancies which might occur at the University Health Center." (Emphasis added.)

H. There is no indication in the record that at any time was Dr. Joshi's application "untabled" by any official connected with the hiring process and, of course, she was never notified that her application was not still "on the table."

Finally, the defendants cannot rely upon the fact that Dr. Joshi had placed a notice in the Tallahassee Democrat advertising her association with another doctor in the practice of family medicine. As we stated in Joshi I:

The fact that this ad appeared in the paper, however, is insufficient to support a finding that the defendants did not consider Dr. Joshi's application because they believed that she was employed elsewhere and, therefore, was no longer interested in employment as a staff physician at the Health Center.... Moreover, the ad did not appear in the newspaper until July, 1976, and, therefore, can not even be considered as an explanation for the defendants' failure to consider Dr. Joshi's

application at the June 11, 1976, meeting of the physicians screening committee to review the applications then on file.
Joshi I at 646 F.2d 981, 989.

Thus, we have a situation in which Dr. Joshi herself testified that she had not withdrawn her application, that members of the selection group and other officials of the University had told her that she was to be considered for the next vacancy and that she was actually being considered. As we previously stated in Joshi I: "The evidence overwhelmingly supports the conclusion that Dr. Joshi remained actively in the running for employment at the Health Center during the time period after she was notified that Dr. Hunter had been

selected to fill a position as staff physician." 646 F.2d at 989. In light of the above recited facts showing the participation of the University officials in the acts upon which we based that conclusion, it would be sophistry for us to hold that there is any factual support for the defendants' claim that they did not know she was an applicant. All the facts are to the contrary.

We, therefore, conclude that the trial court's finding that the defendants "did not in fact believe that she was an applicant" is clearly erroneous. The defendants have therefore failed to satisfy the requirements of Burdine that they "clearly set forth, through the

introduction of admissible evidence, the reasons for the plaintiff's rejection" which "must be legally sufficient to justify a judgment for the defendant." 450 U.S. at 254, 255, 101 S.Ct. at 1094, 1095.

(6) FSU also attempted to rebut Joshi's prima facie case by showing that the males hired or offered the position were at least as qualified as she. This articulated reason is also insufficient as a matter of law. The district court found that "the plaintiff was not actively considered for hiring" during this period. This finding is supported by the facts that no one contacted Joshi and that her application was not considered by the screening committee or the director. Because she was not

considered, her qualifications were not compared to those of the male applicants and hence, the relative qualifications of those applicants cannot be a reason for the defendants' failure to hire her. In Eastland v. Tennessee Valley Authority, 704 F.2d 613, 626 (11th Cir. 1983) cert. denied, ____, U.S. ___, 104 S.Ct. 1415, 79 L.Ed.2d 741 (1984), this Court stated:

The district court found that even if Eastland established that he was qualified for the position, TVA's hiring decision was justified because the white applicant had superior qualifications. But TVA's selecting supervisor did not know whether the white applicant's qualifications were superior at the time the hiring decision was made. TVA's

decision cannot be defended on the basis of the relative qualifications of the applicants if these qualifications were not considered.

Similarly, in this case, because Joshi's qualifications were not considered, FSU cannot rely on its contention that other candidates were better qualified to explain its decision not to hire her.

We conclude, therefore, that neither of the reasons articulated by defendants is sufficient to rebut Joshi's prima facie case. She has thus established that FSU discriminated against her in its failure to select her for a position at the University Health Center.

(7) The district court stated in its oral decision, "there is no evidence before this court and the court finds

that her gender was not a factor in her failure to be considered or to have her application considered." This finding is erroneous as a matter of law. Joshi has proven sex discrimination in the method established by the Supreme Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). We held in Joshi I that she had established a prima facie case of discrimination. We have here held that defendants' articulated reasons for failing to hire her are legally insufficient. Hence, the prima facie case stands unrebutted, and discrimination is established. See Burdine, 450 U.S. at 254, 101 S.Ct. at 1094 (1981). Thus, plaintiff has established that sex was a factor in

defendants' decision not to consider her. The presence or absence of direct evidence that sex was a factor is irrelevant.

C. Defendants' Showing that Plaintiff Would Not Have Been Hired Even in the Absence of Discrimination

"Once discrimination has been proven, whether by circumstantial or direct evidence, a presumption of entitlement to appropriate remedies such as injunctive and/or declaratory relief, as well as hiring and back pay arises. The burden then shifts to the employer to rebut the presumption by showing that the discriminatee would not have been hired absence the discrimination." Lewis v. Smith, 731 F.2d 1535, 1538 (11th Cir. 1984) (citations omitted).

(8) The district court found that "the persons ultimately chosen, that's Drs. Heller and Latti (Latey), had qualifications at least equal to those of the plaintiff." The court's finding that Heller and Latey were at least as qualified as Joshi is not clearly erroneous. This fact, however, is insufficient to meet defendant's burden of showing that Joshi would not have been hired absence the discrimination. In Joshi I we found that two other physicians, Burk and Freeble, were also offered the position. This finding is binding on this Court as law of the case. In order to prove that Joshi would not have been hired even in the absence of discrimination, defendants

are required to show by a preponderance of the evidence[2] that all those to whom

2. The standard of proof is described in Lewis as follows:

> Since the Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) decision, which involved constitutionally protected conduct, even though not a violation of Title VII, this court and the Fifth Circuit have required a showing "by a preponderance of the evidence" that the plaintiff would not have been hired absence the discriminatory action. Id. at 287, 97 S.Ct. at 576. Perryman v. Johnson Products Co., Inc., 698 F.2d 1138 (11th Cir. 1983); Bell v. Birmingham Linen Service, 715 F.2d 1552 (11th Cir. 1983); Lee v. Russell County Bd. of Ed., 684 F.2d 769 (11th Cir. 1982); Ramirez v. Sloss, 615 F.2d 163 (5th Cir. 1980).

731 F.2d at 1529. See also, Walker v. Ford Motor Co., 684 F.2d 1355, 1362 (11th Cir. 1982).

the position was offered, not merely those ultimately employed, were better qualified than Joshi.

(9) The district court made no findings as to the relative qualifications of Joshi and the two offerees. Ordinarily, we would remand to the district court for a finding on this factual question. In the instance case, however, a remand is unnecessary. There is nothing in the record below from which the court could conclude that Burk was better qualified than Joshi. In fact, the Director of the Health Center admitted that he did not have a resume for Dr. Burk and responded on cross-examination as follows:

Q: In fact, today you can't tell

us what his (Burk's) qualifications were, can you?

A: No. The only thing I recall about him is that he was at a student health center in North Carolina, Chapel Hill, right?

Hence, there is no evidence from which the Court could conclude that all of those to whom the job was offered, including Burk, were better qualified than Joshi. Defendants have thus failed to meet their burden of proving that Joshi would not have been hired in the absence of discrimination.

III. CONCLUSION

Joshi established a prima facie case of discrimination as we previously held in Joshi I. The defendants articulated reasons for failure to hire her failed to rebut that prima facie case. We hold, therefore, that Joshi has

established that FSU discriminated against her by failing to hire her as a staff physician. The defendants have not carried their burden of proving that Joshi would not have been hired in the absence of discrimination. Hence, we hold that Joshi is entitled to appropriate relief, including hiring and back pay. We remand for the district court to enter a judgment consistent with this opinion.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

DR. ANJALI A. JOSHI,

Plaintiff,

TCA NO. 78-0844

vs.

FLORIDA STATE UNIVERSITY
HEALTH CENTER, ET AL.,

Defendants.
_____/

JUDGMENT

This action came on for trial before the Court, Honorable Maurice M. Paul, District Judge, presiding, and issues having been duly tried and having heard the testimony of the witnesses and having reviewed the evidence and the file and hearing argument of counsel: and having found that Defendants had

legitimate, nondiscriminatory reasons for not hiring the Plaintiff; that those ultimately chosen had qualifications equal to or better than those of the Plaintiff; that no active discrimination was present and further that the Plaintiff's gender was not a factor in her failure to be considered,

IT IS ORDERED AND ADJUDGED,

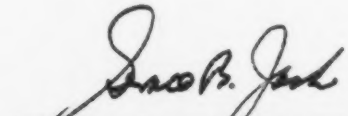
That the Plaintiff is not entitled to prevail, that the action and all Defendants be dismissed on the merits, and that the Defendants recover of the Plaintiff their costs of this action.

Dated this 1st day of June, 1984 at Tallahassee, Florida.

/s/
Maurice M. Paul
United States District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit and Appendix was mailed to STEPHEN LINDSEY GORMAN, Gorman & Matthew, Post Office Box 1754, Tallahassee, Florida, and ALGIA R. COOPER, c/o Stephen Lindsey Gorman, Post Office Box 1754, Tallahassee, Florida, this 13th day of September, 1985. I further certify that all parties required to be served have been served.



GERALD B. JASKI